

No. 98596-1

NO. 78985-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE DEPENDENCY OF:

E.M.,

Minor Child.

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

REPLY BRIEF

JAN TRASEN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

I. ARGUMENT 1

 A. The mother argued below that the juvenile court was interfering with E.M.’s relationship with his retained attorney, adequately preserving this issue 1

 B. Even if moot, which is not conceded, this case involves a matter of continuing and substantial public interest 3

 C. The court misapplied RCW 13.34.100(7), requiring reversal for further proceedings. 6

 D. The GAL’s and CASA’s, are insufficient to protect E.M.’s interests, requiring independent counsel for the child. 9

II. CONCLUSION 12

TABLE OF AUTHORITIES

Washington Supreme Court

Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 43 P.3d 4 (2002)..... 7

Hart v. Dep't of Soc. & Health Servs., 111 Wn. 2d 445, 759 P.2d 1206, 1208 (1988)..... 3, 4

In re Cross 99 Wn.2d at 377 5

In re Dependency of M.S.R., 174 Wn.2d 1, 271 P.3d 234 (2012)..... 10

Rest. Dev., Inc. v. Cananwill, Inc., 150 Wn.2d 674, 80 P.3d 598 (2003)... 8

Sorenson v. City of Bellingham, 80 Wn. 2d 547, 496 P.2d 512, 518 (1972) 6

State v. Beaver, 184 Wn.2d 321, 358 P.3d 385 (2015)..... 4

State v. Hunley, 175 Wn.2d 901, 287 P.3d 584 (2012) 4

State v. Quismundo, 164 Wn.2d 499, 192 P.3d 342 (2008) 11

State v. Rohrich, 149 Wn.2d 647, 71 P.3d 638 (2003))..... 11

Washington Court of Appeals

Dependency of A.E.T.H., 446 P.3d 667 (2019)..... 11

In re Dependency of B.F., 197 Wn. App. 579, 389 P.3d 748 (2017)..... 1

In re J.R., 156 Wn. App. 9, 230 P.3d 1087 (2010) 6

In re Welfare of Hansen, 25 Wn. App. 27, 599 P.2d 1304 (1979)..... 1

In re Welfare of K.M.M., 187 Wn. App. 545, 349 P.3d 929 (2015) 6

In the Matter of the Dependency of Griffin Lee, 200 Wn. App. 414, 404 P.3d 575 (2017)..... 9, 10

Matter of Custody of S.M., 9 Wn. App.2d 325, 444 P.3d 637 (2019)..... 7

Dependency of S.K.P., 200 Wn. App. 86, 401 P.3d 442, aff'd, In re Dependency of E.H., 191 Wn.2d 872, 427 P.3d 587 (2018) 10

Statutes

RCW 13.34.100(7)(a). 6, 7

RCW 13.34.100(7)(b)(i) 3, 7

Rules

RPC Preamble (20) 2

I. ARGUMENT

- A. The mother argued below that the juvenile court was interfering with E.M.'s relationship with his retained attorney, adequately preserving this issue.

Julia M. argued below that E.M. was represented by Aimee Sutton, and she supported Ms. Sutton's motion for reconsideration of E.M.'s placement in foster care. CP 1953.

Julia has an interest in ensuring that her son is represented by skilled and independent counsel. The juvenile court order striking Ms. Sutton's notice of appearance, as well as striking Ms. Sutton's motion to reconsider E.M.'s placement in foster care – stands in the way of Julia's interest. RP 4-22. Respondent seems to concede that Julia is an aggrieved party. See In re Dependency of B.F., 197 Wn. App. 579, 584, 389 P.3d 748 (2017) (quoting In re Welfare of Hansen, 25 Wn. App. 27, 35, 599 P.2d 1304 (1979)).

The juvenile court refused to hear argument on the motion to reconsider after striking Ms. Sutton's appearance and pleadings, which were adopted by the mother. RP 14-21. Respondent suggests that Ms. Sutton conceded this issue below. Response Brief at 15-16. The Respondent writes that Ms. Sutton asked the dependency court to "confirm counsel's appearance" on behalf of E.M. Response Brief at 15

(citing CP 259). In addition, Respondent states that Ms. Sutton acknowledged “that ultimately this court will have the power to decide whether she has authority to represent [E.M.]” Response Brief at 15 (citing CP 259).

Respondent is mistaken. Neither of these statements is a concession. For counsel below to recognize in her pleadings that she is before a court rendering a ruling is not a concession that the court cannot and has not erred.

The appearance of E.M.’s retained counsel, despite the Department’s present argument, was hardly uncontested. The juvenile court set up an inappropriate gladiator-like argument, whereby all of the other parties were asked to weigh in against the appointment of Ms. Sutton. RP 5. The Department’s and the father’s objections to Ms. Sutton’s representation were – in the words of the RPCs – invoked “as procedural weapons.” RPC Preamble (20).

The juvenile court’s interference in the attorney-client relationship, preserved for review, should not be condoned by this Court.

B. Even if moot, which is not conceded, this case involves a matter of continuing and substantial public interest.

In general, the appellate court will not hear cases that are moot. Hart v. Dep't of Soc. & Health Servs., 111 Wn. 2d 445, 449, 759 P.2d 1206 (1988). The Department argues this Court cannot provide effective relief, and therefore this matter is moot. Response Brief at 16.

First, it is not conceded that this matter is moot due to Judge Sutton's appointment to the Superior Court bench. Should this Court determine the juvenile court erred in its interpretation of RCW 13.34.100(7)(b)(i), which acknowledges that some children may be represented by privately retained counsel, this case could be remanded for E.M. to be again represented by alternative retained counsel.¹ Judge Sutton's appointment does not cure or alleviate the lower court's error; nor does it protect the interests of E.M. in his right to independent counsel. Compare RCW 13.34.100(7)(a) (attorney may be requested by "a parent, the child, a guardian ad litem, a caregiver, or the Department") with RCW 13.34.100(7)(b)(i) (some children may be represented by privately retained counsel).

¹ Respondent previously conceded the statute permits retained counsel. In re E.J.M., No. 78985-6, Commissioner's ruling, at 4 ("The Department now

Even if this Court finds this matter to be moot, the questions presented involve a matter of continuing and substantial public interest that should be heard by this Court.

Courts do not generally consider cases that are technically moot. State v. Beaver, 184 Wn.2d 321, 330, 358 P.3d 385 (2015). However, a reviewing court may decide a moot appeal if it poses a question of “continuing and substantial public interest.” Id. Courts consider three factors: the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question. Id. at 330-31 (citing State v. Hunley, 175 Wn.2d 901, 907, 287 P.3d 584 (2012)).

The public interest exception is most often used in cases involving constitutional interpretation and the interpretation of statutes. Hart, 111 Wn.2d at 449. Julia’s case involves both constitutional and statutory issues. The order on review raises issues of the fundamental right to parent under Art I. Sec. 7 of the Washington Constitution, the right to counsel for children, and the sanctity of the

acknowledges that the statute contemplates retained counsel for a child in some circumstances”).

attorney-client relationship. The Superior Court's order also raises questions as to the interpretation of RCW 13.34.100(7) and RCW 13.34.100(7)(b)(i).

Julia meets the three elements for an exception to the mootness doctrine. See In re Cross, 99 Wn.2d 373, 377, 662 P.2d 828 (1983). First, the issue is of a public nature because it concerns when the court oversteps its gatekeeper function to interfere with the attorney-client relationship. It also involves the right of a parent or close family member to retain private counsel for a minor child during a dependency. See id.

Second, an authoritative determination in this matter would guide future courts as to whether the government can intrude into a parent's right to retain counsel for a dependent child. This issue could arise in a non-dependency context, as well. See id.

Third, this issue is likely to recur in this dependency case and in future dependency cases. This issue affects cases beyond the instant matter, as the issues of abuse and neglect know no socio-economic boundaries. It is inevitable that families of means, who can afford to

hire private counsel, will follow suit by retaining counsel when faced with a dependency petition. Guidance for the courts would be helpful.

The exception to mootness exists where the “real merits of the controversy are unsettled and a continuing question of great public importance exists.” Sorenson v. City of Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512, 518 (1972). Here, the area of retained counsel for minor children remains unsettled, and even if this matter is determined to be moot, this Court should clarify the state of the law.

C. The court misapplied RCW 13.34.100(7), requiring reversal for further proceedings.

This Court should reverse because the juvenile court improperly interfered with the attorney-client relationship. Review of the court’s order is de novo, since it is a matter of statutory interpretation. In re Welfare of K.M.M., 187 Wn. App. 545, 572, 349 P.3d 929 (2015); In re J.R., 156 Wn. App. 9, 230 P.3d 1087 (2010).

The court applied RCW 13.34.100(7) erroneously when it concluded that Ms. Sutton’s notice of appearance conflicted with the statute or the RPC’s because it was not pre-approved by the parties or by the court. RP 18-21; CP 263-64. The court’s analysis, as discussed

in the mother's Opening Brief, pertains to appointed counsel cases, but it is inapposite to this retained counsel matter. RP 18-21; CP 263-64.

Without any authority, the juvenile court stated that because the client in this case was a child, Ms. Sutton could not be retained by a third party. RP 19. "It's not a situation where we just wholesale, have parties coming in, hiring private lawyers and having them file notices of appearance on behalf of children. It just doesn't happen in dependency." *Id.* Clearly, the court was mistaken, as here we are.

Respondent argues that RCW 13.34.100(7)(b)(i) cannot be read in isolation from the remainder of the statute, and must be read in conjunction with RCW 13.34.100(7)(a). Response Brief at 22. However, to harmonize the two sub-sections in the way Respondent suggests requires simply deleting sub-section (b)(i) completely, or rendering the sub-section meaningless.

If a statute's meaning is plain on its face, courts must give effect to that meaning and the inquiry ends. Matter of Custody of S.M., 9 Wn. App.2d 325, 334, 444 P.3d 637 (2019) (citing Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). "[A] court must not add words where the legislature has chosen not to include them. A court also must construe statutes such that all of the

language is given effect, and ‘no portion [is] rendered meaningless or superfluous.’ ” Id. (quoting Rest. Dev., Inc. v. Cananwill, Inc., 150 Wn.2d 674, 682, 80 P.3d 598 (2003) (alteration in original) (internal citation omitted).

Respondent’s interpretation of the juvenile court’s order requires one of two options: either 1) reading language into the statute that does not exist (requiring that retained counsel be “approved” by the court, via RCW 13.34.100); or 2) rendering meaningless sub-section (b)(i)(B), which permits retained counsel for dependent children. Neither is permitted under the rules of statutory interpretation. S.M., 9 Wn. App.2d at 334.

Respondent is correct that children in dependency are particularly vulnerable. Response Brief at 24. This is the reason a highly trained and experienced advocate like Ms. Sutton was – and is needed – as independent counsel for a child like E.M.²

² Respondent suggests the court exercised judicial oversight to ensure “only well-trained attorneys” serve the role of representing dependent children. Response Brief at 24. It is beyond dispute that even before the time of her appointment, Judge Sutton was highly qualified to represent E.M. CP 392 (declaration stating she had been practicing since 2003, had represented thousands of clients, including juveniles and adults, throughout Washington, including dependencies).

D. The GAL's and CASA's, are insufficient to protect E.M.'s interests, requiring independent counsel for the child.

During dependency proceedings, the existing safeguards, including the appointment of a Court-Appointed Special Advocate (CASA) or Guardian ad Litem (GAL), are insufficient to protect the rights of a dependent child. In the Matter of the Dependency of Griffin Lee, 200 Wn. App. 414, 452-53, 404 P.3d 575 (2017).

Respondent's explanation concerning the reasons for the short tenures for some of the CASA's or GAL's does not alleviate the concern for the lack of representation for E.M. Response Brief at 12-13. Nor does it explain the gap of two years that transpired for E.M. without a GAL or CASA. Commissioner Neel recognized this distressing pattern in her ruling. In re E.J.M., No. 78985-6, Commissioner's ruling, at 4; see also Letter of Assistant Attorney General Kelly Taylor and attachments, filed in Court of Appeals, Feb. 15, 2019 (Taylor letter to Court).³ One significant time period without

³ There is no explanation, for example, for the gap of 15 months with no GAL or CASA, between April 4, 2016, to July 10, 2017. This is followed by another period of 9 months with no GAL from October 24, 2017 to July 19, 2018. Taylor letter.

a CASA consisted of a gap of 15 months (04/04/16–07/10/17), followed by another period of nine months (10/24/17–07/19/18). Id.

E.M. had no advocate in the courtroom for a majority of the dependency, particularly during “key events” that required the court to hear his voice. See E.J.M., Commissioner’s ruling at 4. As the Commissioner stated, this is concerning, particularly for a young child like E.M. Id. It also mitigates in favor of his need for counsel, which E.M. actually briefly had in Aimee Sutton – and with which the juvenile court impermissibly interfered.

Of course, GAL’s and CASA’s are not trained counsel, and do not have the same duties, training, and ethical responsibilities to a child as an attorney would. Lee, 200 Wn. App. at 452-53 (quoting S.K.-P., 200 Wn. App. 86, 110-11, 401 P.3d 442, aff’d, In re Dependency of E.H., 191 Wn.2d 872, 427 P.3d 587 (2018)). As this Court noted in Lee, “the ways that an attorney can assist a person in need – as Griffin plainly is – are sometimes limited only by the imagination, intellectual dexterity, and assertiveness of the lawyer.” 200 Wn. App. at 454; In re Dependency of M.S.R., 174 Wn.2d 1, 21-22, 271 P.3d 234 (2012).

Particularly in a highly contested matter such as this, where a child's interests may not be aligned with either the Department's or the parents', counsel for the child is appropriate. See A.E.T.H., 446 P.3d 667, 2019 WL 3775873, at *12 (2019).

Either under de novo review or the abuse of discretion standard, this Court should reverse. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)).

For the reasons above, as well as those discussed in the Opening Brief, the juvenile court's order was based upon an erroneous interpretation of RCW 13.34.100(7), so this Court should reverse after granting de novo review. K.M.M., 187 Wn. App. at 572. The court also reached its decision by applying the wrong legal standard, rendering its decision untenable. Quismundo, 164 Wn.2d at 504 (citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

This Court should reverse the juvenile court order which interfered with counsel for the child's appearance and struck Aimee Sutton's notice of appearance of pleadings.

II. CONCLUSION

For the reasons set forth above, as well as those in the Opening Brief, Julia M. respectfully requests this Court reverse the juvenile court order, as the court impermissibly interfered in the attorney-client relationship, which deprived E.M. of his counsel.

DATED this 5th day of November, 2019.

Respectfully submitted,

s/ Jan Trasen

JAN TRASEN (WSBA #41177)
Washington Appellate Project-(91052)
Attorneys for Appellant

WASHINGTON APPELLATE PROJECT

November 05, 2019 - 3:32 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 78985-6
Appellate Court Case Title: Dep of E.J. M., Julia Morgan, Petitioner v. DSHS, Respondent

The following documents have been uploaded:

- 789856_Briefs_20191105153044D1939385_4425.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was washapp.110519-06.pdf
- 789856_Motion_20191105153044D1939385_2924.pdf
This File Contains:
Motion 1 - Extend Time to File
The Original File Name was washapp.110519-05.pdf

A copy of the uploaded files will be sent to:

- casa.group@kingcounty.gov
- kathleen.martin@kingcounty.gov
- kellyt1@atg.wa.gov
- shsseaf@atg.wa.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Jan Trasen - Email: jan@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20191105153044D1939385